In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. (Original)

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT; CURTIS D. WILBUR, FRANCIS A. GARRECHT, WILLIAM DENMAN, CLIFTON MATHEWS, ALBERT LEE STEPHENS and WILLIAM HEALY, as United States Circuit Judges in and for said Ninth Circuit; HOMER T. BONE, as member of said Circuit Court (subject to qualification); PAUL P. O'BRIEN, as Clerk of such Court,
Respondents.

PETITION FOR WRIT OF MANDAMUS
and
MOTION FOR LEAVE TO FILE.

AARON M. SARGENT,
Hobart Building, San Francisco 4, California,
Attorney for Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Owen J. Roberts, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, and Wiley Rutledge, Associate Justices of the Supreme Court of the United States:

Ernest H. Denicke and Mary E. Doble, the petitioners above named present the document attached hereto designated "Petition for Writ of Mandamus" and move for an order granting leave to file same as an original proceeding in this Court.

Authorities in Support of Motion.

Petitioners seek to institute this action, as an original proceeding, in order to vacate the void judgment, opinion and other entries in the following matter brought to this Court on application for certiorari:

No. 155 "Denicke v. The Anglo California National Bank of San Francisco, et al".

Petition therein was denied October 9, 1944. Petition for rehearing therein will be filed herewith.

In that petition we show that this Court has, in effect. treated such certiorari application as being one made before decision in the Circuit Court. Since all entries made in the Circuit Court were void for violation of court rules—this statement appears to be literally true.

It has become necessary to prosecute a separate action to clear the record. There is a deadlock in the Circuit Court of Appeals. Action to break it up must be obtained

by process issued from this Court. Either or both of the following remedies are available:

1. Summary orders issued from this Court to the Circuit Court under Section 240 of the Judicial Code—commanding the latter Court to take the action which should have been taken in the first instance. Orders made under that section would constitute a special exercise of this Court's "power of supervision" within the meaning of Rule 38, and within the intent of the Jurisdictional Act of 1925 (43 Stat. 936, Chapt. 229).

2. Independent action by writ of mandamus prosecuted by means of the petition presented herewith.

This latter remedy would cover, as of right, any relief which the Court may not deem available to us under Section 240 of the Judicial Code. This Court has an undoubted power of supervision. There is no question regarding the right of petitioners to invoke its jurisdiction and apply for an exercise of that power. If there be a question, it can only be concerned with the nature of the legal action to be employed in bringing about the desired result.

Mandamus will lie whenever the remedy at law is inadequate. If this Court shall find itself unable to grant relief by the making of orders within the scope of the jurisdiction on certiorari, it follows that leave to file the attached petition must be granted, as of course.

The legal basis for independent action is clear. We cite Judicial Code, Sec. 234 (28 USCA 342) which provides:

> "The Supreme Court shall have power to issue writs of prohibition to district courts, when proceed-

ing as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States. . . ."

General power to issue writs is conferred by Section 262 of the Judicial Code (28 USCA 377):

"The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

In addition, this Court has a constitutional power of supervision:

"The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (Art. III, Sec. 1.)

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. . . .

"The Senators and Representatives . . . all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution. . . ." (Art. VI.)

Decisions Sustaining Right to Mandamus.

(1) *Hollon Parker, Petitioner,* 131 US 221 at 226:

"The right of mandamus lies, as held in Ex parte Parker, 120 US 737, where an inferior court refuses to take jurisdiction when by law it ought to do so, *or where, having obtained jurisdiction, it refuses to proceed in its exercise.*"

(2) *Ex parte Simons,* 247 US 231;

(3) *Ex parte Parker,* 120 US 737;

(4) *Ex parte Metropolitan Water Co.,* 220 US 539:

Facts: Petitioner invoked the original jurisdiction of this court to obtain a writ of mandamus to vacate void entries made in a District Court, and to compel that court to convene a panel of three judges to hear and determine a case involving constitutionality of a state law. It was held that the writ should issue. We quote from the opinion of Chief Justice White:

"Congress having declared that the merits . . . should be considered and determined by a tribunal consisting of three judges constituted as provided in the act, it results that a tribunal not so constituted did not possess jurisdiction over the subject-matter. . . .

"It follows . . . that the order entered . . . vacating the restraining order theretofore issued and denying the application for an injunction was void. This being the case, it necessarily follows that mandamus is the proper remedy. . . .

"Not being vested with original jurisdiction to pass upon the question of the validity of the Kansas statute, and the petitioner being entitled as of right to have the controversy . . . passed upon by a tribunal

having such original jurisdiction, it follows that we do not possess a discretion to grant or refuse the writ. . . ." (220 US 545-546.)

Subject-Matter of Petition.

Our application seeks only to vacate void entries, and to compel the convening of a court constituted in a manner which will insure a full discharge of the duty of appellate review to which we are entitled under the Fifth Amendment.

We apply for an order that will compel a court, so convened, to pronounce judgment and render an adequate opinion upon the basic questions which are necessary to the validity of the judgment under attack.

We invoke the original jurisdiction of this court and seek the full measure of relief available under the Constitution and laws of the United States in a proceeding of that character.

Dated, San Francisco, California,
October 31, 1944.

AARON M. SARGENT,
Attorney for Petitioners.

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PETITION FOR WRIT OF MANDAMUS.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Owen J. Roberts, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, and Wiley Rutledge, Associate Justices of the Supreme Court of the United States:

Ernest H. Denicke and Mary E. Doble, the petitioners above named hereby apply to this Court for issuance of a Writ of Mandamus directed to respondents, and providing for the relief hereinafter specified. The following statement is presented in support of such application:

I.

Petitioners are appellants in the following matter now pending in the United States Circuit Court of Appeals for the Ninth Circuit, viz.:

> Case No. 10,329 entitled "Ernest H. Denicke and Mary E. Doble, Appellants v. The Anglo California National Bank of San Francisco, et al., Appellees."

Petition for Writ of Certiorari in that case was filed in this Court, being docketed as October Term, 1944, No. 155. This Court has on file certified copies of portions of the record in said cause. That record is judicially noticed in the within proceeding. The matters set forth therein are incorporated by reference in support of this petition.

II.

Respondents Curtis D. Wilbur, Francis A. Garrecht, William Denman, Clifton Mathews, Albert Lee Stephens and William Healy are now, and have been at all times herein mentioned, United States Circuit Judges in and for

the Ninth Circuit; respondent Homer T. Bone was appointed by the President and confirmed by the Senate as a Circuit Judge for said circuit; petitioners are advised that such respondent has not yet taken the oath required for qualification, but that he may assume the duties of judge in said circuit before issuance of a writ hereunder. Respondent Paul P. O'Brien, is Clerk of said Circuit Court, and as such has possession of the files and records herein described.

III.

On March 1, 1944, while said Circuit Court of Appeals was in adjournment, respondents William Healy and Paul P. O'Brien caused the following proceedings to be entered in the records of said court in case No. 10,329, viz.:

Item No. 1. An opinion was filed while the Court was adjourned. The following is a true copy of the signature clause thereon:

> "We need not stop to inquire whether the order denying appellants' motion to vacate the judgment was appealable, for the opinion already sufficiently indicates our view that appellants had ample time and a reasonable opportunity to present a full showing in opposition to the compromise. We find no merit in other points argued.
>
> "Affirmed.
>
> _____
>
> _____
>
> William Healy,
>
> United States Circuit Judges."

Item No. 2. Respondent O'Brien made the following entry in the minutes:

"ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE

By direction of the Court, ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this Court in accordance with the opinion rendered."

No such order was ever announced at any session of the Court.

Item No. 3. Respondent O'Brien filed an unsigned printed form without signature, which purports to be a decree in said cause. The following is a true copy thereof:

"United States Circuit Court of Appeals
for the Ninth Circuit

No. 10329

Ernest H. Denicke and Mary E. Doble,
Appellants,

vs.

Anglo California Nat'l Bank, et al.,
Appellees.

DECREE

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court that the judgment of the said District Court in this case be, and hereby is, affirmed with costs in favor of the appellees and against the appellants.

It is Further Ordered, Adjudged, and Decreed by this Court, that the appellees recover against the appellants for their costs herein expended, and have execution therefor."

Item No. 4. Respondent O'Brien caused said document, purporting to be a "Decree", to be entered in the minute book of said Circuit Court.

IV.

On November 30, 1936 said Circuit Court duly and regularly adopted an amendment to Rule III of the Rules of Practice of such Court. Such amendment was evidenced by an original document filed by respondent O'Brien as a part of its records. The following is a true copy thereof:

"United States Circuit Court of Appeals
for the Ninth Circuit

In the Matter of the Amendment
of Rule III of the Rules of
Practice of this Court.

It is Hereby Ordered that Rule III of the Rules of Practice of this Court be amended by the addition of a paragraph numbered (4) to said rule, as follows:

(4) No adjournment in any of the terms of the Court shall be made to the succeeding term save when made on the last day prior to the beginning of such succeeding term. Appeals shall be deemed de-

cided when announced from the bench in a session of the court at the place of the term in which they are submitted, or when the signed opinions or other documents evidencing their decision are filed with the Clerk.

Dated: Nov. 30, 1936.

(Signed)	Curtis D. Wilbur
	Francis A. Garrecht
(Endorsed)	William Denman
Filed Nov. 30, 1936	Clifton Mathews
Paul P. O'Brien, Clerk	Bert Emory Haney
	United States Circuit Judges."

The Judges who signed that amendment constituted the entire Court on November 30, 1936. Such amendment has been in force ever since that date. The documents and entries described in paragraph III hereof were void and in violation of its terms. The said Circuit Court adjourned on February 28, 1944 until Monday, March 6, 1944. There were no sessions of said Court in the interim.

V.

Petitioners filed a motion in said Circuit Court to vacate said proceedings. Respondents William Healy and Clifton Mathews sat to act on that motion. The latter made the following statement from the bench when petitioners sought to argue the matter:

> "Rule 3, paragraph 5, is a rule made by this court for the guidance and protection of its clerk. Neither you nor your clients have any interest in enforcing that rule. It isn't any of your business whether that is complied with, or not."

Such motion was denied from the bench. There is no action which petitioners are able to take in said Circuit Court to obtain relief from the proceedings described.

VI.

Petitioners have sought relief in this Court under Section 240 of the Judicial Code. Certiorari was denied on October 9, 1944. Petition for a rehearing in that matter will be filed herewith. This application is intended to supplement such petition in case No. 155, to secure such relief as this Court cannot or may not grant thereon.

VII.

The appeal taken to said Circuit Court in said case No. 10,329 involves the following questions that affect the validity of the judgment under attack:

1. Whether the District Court granted petitioners a constitutional trial on their objections (R. 333, 340, and 403) under the terms of any of the following minute entries made by said Court:

March 31, 1942 (R. 392)
April 13, 1942 (R. 398-399)
May 1, 1942 (R. 399)
May 13, 1942 (R. 402)
June 13, 1942 (R. 429)
June 22, 1942 (R. 438)

2. Whether petitioners were entitled to set aside the judgment of the District Court on the ground of mistake, because of reliance upon the terms of said minute entries.

3. Whether the District Court acted arbitrarily, or in excess of its discretion, or failed to exercise any discre-

tion in denying the motion to vacate and other applications for relief described in the order (R. 737-739) made by said Court on August 17, 1942.

VIII.

Petitioners have taken all legal steps available to them to obtain a determination of those questions by said Circuit Court. Those respondents joined herein who are now Judges of said Court have declined to act or pronounce any judgment on appeal with respect to same. It is impossible to obtain a determination thereof in the said Circuit Court without the use of process in the form of a Writ of Mandamus hereunder, or by virtue of appropriate procedure on certiorari, issued by authority of this Court.

IX.

A condition exists in said Circuit Court whereby petitioners are entitled as of right to have Case No. 10,329 heard and decided by the entire Court sitting in bank. Respondents William Healy and Clifton Mathews are involved in violations of Rule III of said Court of such character as to render their participation a denial of due process. Without participation of all other members of said Court on said appeal, it is impossible for petitioners to obtain an adequate consideration thereof in said Court.

Wherefore, petitioners apply to this Court for issuance of a Writ of Mandamus directed to respondents and commanding performance of the following duties enjoined by law, viz.:

1. Cancellation of the documents and entries described in paragraph III hereof.

2. Calling together and convening of a special panel of the United States Circuit Court of Appeals for the Ninth Circuit, to consist of all members of that Court not under legal disqualification, to sit and decide each of the questions described in paragraph VII hereof.

3. Rendition of an opinion in writing supported by the signatures of at least a majority of the judges acting in said matter, filed in compliance with rule III of said Court; such opinion to evidence the action taken by said Court with respect to each ground relied upon to sustain the judgment to be entered by said Court.

4. Entry of a lawful judgment in accordance with an opinion so prepared and filed.

Petitioners apply for allowance of their costs incurred in this matter, and for such other, further or different relief as may be available to them on the facts presented.

Dated, San Francisco, California,
October 31, 1944.

AARON M. SARGENT,
Attorney for Petitioners.

United States of America
State of California } ss.
City and County of San Francisco

ERNEST H. DENICKE, being first duly sworn, deposes and says:

That he is one of the petitioners above named; that he has verified the foregoing application on his own behalf and on behalf of Mary E. Doble, who has joined therein; that affiant has read said "Petition for Writ of Mandamus", knows the contents thereof; that all matters therein stated are true to his own knowledge.

ERNEST H. DENICKE.

Subscribed and sworn to before me this 31st day of October, 1944.

(Seal) CATHERINE E. KEITH,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires December 15, 1946.